STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2008
v	No. 271597 Wayne Circuit Court
TIMOTHY ROY NULL, Defendant-Appellant.	LC No. 05-007927

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, for which he was sentenced to serve 130 months to 35 years' imprisonment. Because we conclude that defendant was not entitled to instruction on the offense of involuntary manslaughter, and that the admission of testimony concerning prior threats against the victim and those with which she was involved was not error, we affirm.

I. Basic Facts and Procedural History

This case arises from the death of Alicia Gyomory. At autopsy, the medical examiner discovered a high level of prescription medication in Gyomory's system. It was ultimately concluded, however, that she died of asphyxiation resulting from strangulation. During questioning by the police defendant acknowledged having choked Gyomory on the day of her death. However, he denied having done so with any intent to kill or otherwise harm her. Rather, he asserted that his actions were taken in an effort to cause Gyomory to vomit and thereby regurgitate an overdose of prescription medication taken by her in an effort to commit suicide. At defendant's subsequent trial for first-degree premeditated murder, the trial court denied defendant's request for instruction on the lesser offense of involuntary manslaughter. Defendant was subsequently convicted and sentenced as stated above.

II. Analysis

A. Instruction on Involuntary Manslaughter

Defendant first argues that the trial court erred in failing to instruct the jury on the offense of involuntary manslaughter. We disagree.

Common law involuntary manslaughter is a necessarily included lesser offense of murder, as the sole element distinguishing the two offenses is malice. *People v Mendoza*, 468 Mich 527, 533, 536, 541; 664 NW2d 685 (2003). "If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter." *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004). "Consequently, when a defendant is charged with murder, an instruction for . . . involuntary manslaughter must be given if supported by a rational view of the evidence." *Mendoza*, *supra* at 541; see also *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

There are "three different theories giving rise to involuntary manslaughter liability." *People v Datema*, 448 Mich 585, 596; 533 NW2d 272 (1995). As explained by our Supreme Court, these include "the unintentional killing of another, without malice, during the commission of an unlawful act . . . not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Mendoza*, *supra* at 536; see also *Holtschlag*, *supra* at 12. Defendant claims that the evidence supported instruction on involuntary manslaughter under each of these theories. Defendant argued at trial that instruction on involuntary manslaughter was warranted under the theory that Gyomory's death occurred during the commission of a lawful act negligently performed. Therefore, this portion of his claim of instructional error is preserved and will be reviewed de novo on appeal. See *People v Walls*, 265 Mich App 642, 644; 697 NW2d 535 (2005), citing *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).[1] However, defendant did not request instruction under the remaining theories. Those portions of his claim of instructional error are therefore unpreserved and will be reviewed for plain error affecting his substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003).

1. Negligent Performance of a Lawful Act

Regarding instruction under the theory that the killing occurred during the commission of a lawful act negligently performed, defendant asserts that the jury could have concluded that although he did not intend to cause an injury by choking Gyomory, he was grossly negligent in doing so. However, a rational view of the evidence does not support this conclusion. At the outset, defendant's statement that he "tried to choke [Gyomory] to make her puke" is irrational on its face. Further, no evidence was presented that choking someone could induce vomiting. Rather, defendant's own expert explained that a chokehold would be used as a mechanism for strangulation. Thus, defendant's own words conflict with his conduct.

[1] We disagree with the prosecution's assertion that the question whether a rational view of the evidence supports a requested instruction on a necessarily lesser included offense is a matter left to the discretion of the trial court. To the contrary, the trial court has a duty to instruct the jury on the law applicable to the case, MCL 768.29, and an alleged error in failing to do so is a question of law reviewed de novo on appeal, see *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). See also Black's Law Dictionary (7th ed) (defining a "question of law" as "[a]n issue that, although it may turn on a factual point, is reserved for the court . . . .").

Regardless, even accepting that choking could induce vomiting, there is no evidence of gross negligence. *Holtschlag*, *supra* at 21-22. A defendant is grossly negligent where "he realizes the risk of his behavior and consciously decides to create that risk. As with negligence, however, the actor does not seek to cause harm, but is simply recklessly or wantonly indifferent to the results." *Datema*, *supra* at 604 (citation and internal quotation marks omitted). Here, if defendant's statement is believed, he was not recklessly or wantonly indifferent to the result of his action and did not consciously decide to create a risk of death. Rather, defendant intended the opposite result of what actually occurred, i.e., to prevent Gyomory from dying. Consequently, a rational view of the evidence does support an instruction under this theory and the trial court did not, therefore, abuse its discretion in refusing to so instruct the jury.

2. Unlawful Act Not Naturally Tending to Cause Great Bodily Harm

Defendant also asserts that a rational view of the evidence supports that he merely assaulted and battered Gyomory, and thereby "hastened her unconsciousness and the operation of the drugs she had taken." However, even if Gyomory were not strangled and defendant's actions amounted to only an assault and battery, no evidence was presented supporting the inference defendant asserts. To the contrary, defendant's own expert concluded that any choking did not affect the cause of death, which the expert asserted was "a result of [a] self-inflicted overdose of . . . the drugs [Gyomory] took." Further, no evidence was presented indicating that any external force affected Gyomory's consciousness or the effects of the drugs in her system. Consequently, the evidence does not support an instruction for involuntary manslaughter under this theory. Defendant has thus failed to establish plain error warranting relief.

3. Negligent Failure to Perform a Legal Duty

Defendant additionally argues that an involuntary manslaughter instruction was appropriate because defendant breached a duty to Gyomory created by the circumstances preceding Gyomory's death. As support for a such a duty, defendant relies on the fact that he and Gyomory were in a sexual relationship, that it was through him that Gyomory gained access to the prescription medication used in her suicide attempt, that he exerted control over the situation by initially notifying emergency services personnel of the suicide attempt, and that he returned to the house after emergency personnel could not help Gyomory. As defendant admits, however, no Michigan case law creates a duty under these circumstances. Thus, the general principle that the duty to protect against a wrong is a moral obligation rather than a legal duty is applicable here and the failure to provide an instruction for involuntary manslaughter under this theory was not error. *People v Kevorkian*, 447 Mich 436, 473; 527 NW2d 714 (1994).[2]

[2] In reaching this conclusion, we reject defendant's reliance on the California Court of Appeals decision in *People v Oliver*, 210 Cal App 3d 138, 143-144; 258 Cal Rptr 138 (1989). Notwithstanding that cases from foreign jurisdictions are not binding on this Court, *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007), the facts of this case are distinguishable from those in *Oliver*, where the defendant removed the victim "from a public place where others might have taken care to prevent him from injuring himself to a private place . . . where only she could provide such care," then failed to provide or seek out such care. Here, defendant exerted

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B. Evidentiary Claims

Defendant next argues that he was denied a fair trial and his right to due process by the admission of "other acts" and hearsay testimony from witnesses Eric Beavers and Eric Smith, both of whom briefly dated Gyomory before her death. Although defendant preserved this issue on hearsay grounds below, he failed to raise this issue in the context of MRE 404(b). Therefore, we review the trial court's decision to admit evidence over a hearsay objection for an abuse of discretion, but review defendant's remaining assignment of error for plain error affecting his substantial rights. *People v Stampler*, 480 Mich 1, 4; 742 NW2d 607 (2007); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

On the first day of trial the prosecution noted its intention to present evidence that while Gyomory was with Beavers, defendant made threats and also grabbed Gyomory's purse, dragged her down the street, punched her in the head, and told her that she was a "dead bitch." The trial court ruled that although MRE 404(b) prohibited testimony that defendant assaulted Gyomory, defendant's threats were relevant and admissible. Beavers subsequently testified that defendant had not only threatened to kill Beavers and Gyomory, but that he also told Beavers to stay away from Gyomory and that he wanted to hurt Beavers because he was with her. On appeal, defendant argues that Beavers' testimony regarding these threats should also have been excluded under MRE 404 as improper character evidence. Defendant similarly asserts that Smith's testimony that defendant threatened to poison Gyomory's dog also violated MRE 404. We disagree.

MRE 404(b) generally precludes parties from introducing evidence of a person's bad character if offered to prove action in conformity with such character. However, a statement is not a prior bad act subject to analysis under MRE 404(b). *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). Rather, its admissibility is gauged by the traditional inquiries of relevance and prejudicial effect. *Id*. at 515. To this end, defendant claims that evidence of his threats toward Gyomory and the others was substantially more prejudicial than probative, and thus should have been excluded because they created the inference that defendant had a propensity for bad conduct. See MRE 403. However, defendant's intent in strangling Gyomory was material to the charge of first-degree premeditated murder, and his threats toward her were highly relevant and probative of such intent. Proof of motive is also generally relevant as probative of the intent necessary for murder. See *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001); see also *People v Williams*, 143 Mich App 574, 585; 374 NW2d 158 (1985) ("[w]hen a defendant claims lack of intent or accident, proof of motive is material to the case"). Here, the probative value of defendant's jealous contempt of Gyomory and those with whom she was involved or appeared to care for was similarly high in light of his statement that he loved Gyomory and merely sought to thwart her attempt at suicide by choking her. Thus, although damaging to the theory of defense offered at trial, the evidence challenged on appeal did not unfairly inject considerations extraneous to the merits of the case. Accordingly, we find no error in the admission of this evidence, plain or otherwise.

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no similar control over Gyomory and, at the outset, attempted to garner emergency medical services for her. Thus, even accepting *Oliver* as persuasive, the facts of this case created no duty.

Defendant also asserts that Smith's testimony that defendant threatened to poison Gyomory's dog was inadmissible hearsay. This argument is without merit. Hearsay is defined as an out-of-court statement offered in court to prove the truth of the matter asserted. MRE 801(c); *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993). Here, Gyomory's statement that defendant threatened to poison her dog was not admitted to show that defendant, in fact, poisoned her dog. Rather, it was admitted to show that defendant threatened Gyomory. Consequently, the statement was not offered for its truth, and therefore, did not constitute hearsay.

Affirmed.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey